

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

UNITED STATES OF AMERICA

VS.

CARLOS MARTINEZ-TELLO

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CRIMINAL NO. 1:08-CR-1248

**MOTION REQUESTING A SEPARATE HEARING TO DETERMINE OR
PRIOR DETERMINATION OF ADMISSIBILITY HEARSAY
STATEMENTS AS A CO-CONSPIRATOR'S EXCEPTION@
TO HEARSAY RULE (RULE 104, F. R. EV. HEARING)**

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES the Defendant, who by and through undersigned Counsel of Record, and pursuant to Rule 104 (a), F. R. Evid., moves that this Honorable Court *direct* the Government to conduct a separate hearing to determine the admissibility of any Aco-conspirator=s exception@ to the Hearsay Rule, Rule 801(d) (2) (E), F R.Cr. P.

Government Counsel may of for hearsay statements against Defendant under the so-called Aco-conspirator exception@ of Rule 801 (d) (2) (E) of the Federal Rules of Criminal Procedure.

If the Government seeks to offer at trial statements under the Aco-conspirator=s exception@ of Rule 801(d) (2) (E), F.R.EV., then it should be required to first establish the unavailability of the declarant of such statements since, even if these statements otherwise fit within the definition of an Aadmission of a party opponent@ under Rule 801(d) (2) (E) as a co-conspirator=s statements such a requirement is nevertheless mandated by the accused=s right to confrontation and cross-examination guaranteed by the Sixth

Amendment to the Constitution.

The Government must also show:

1. That a conspiracy in fact existed;
2. That these Defendants voluntarily joined said conspiracy; and
3. That said statements sought to be admitted were, at the time they were made, in fact made "during the course of" and "in furtherance of" the conspiracy.

Accordingly, this Honorable Court should require the Government to satisfy this Court of existence of the conspiracy and Defendant's participation therein, and that the statements were in fact made "during the course of" and "in furtherance of" that conspiracy at the time they were made before admitting any such statements of co-conspirators pursuant to Rule 801(d) (2) (E), F.R.Cr.P., before the jury and the Government, its Counsel and its witnesses, and it should be instructed to refrain from eliciting, volunteering or referring to any such hearsay statements until the Court makes such a determination or until such hearing is conducted out of the presence of the jury and until this Court has had an opportunity to rule on same.

That such procedure is necessary in order to afford Defendant his right to confrontation and effective assistance of counsel under the Sixth Amendment fundamental fairness under the Fifth Amendment, and the mandates of rules 104 and 801(d) (2) (F) of the Federal Rules of Evidence.

WHEREFORE, the Defendant respectfully prays that this Honorable Court conduct a hearing outside the presence of the jury pursuant to Rule 104(a) and (c), F. R. Ev., to determine whether conspiracy actually existed and that this Defendant was a willing participant and that the statements were in fact made "during the course of" and "in furtherance of" that conspiracy, before admitting any statements of co-conspirators

pursuant to Rule 801(d) (2) (F), F. R. Cr. P., before the jury.

Respectfully submitted,

/s/ Anthony P. Troiani
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CERTIFICATE OF SERVICE

I, Anthony P. Troiani, hereby certify that on the 18th day of September, 2009, a true and correct copy of the foregoing motion was served on the following:

VIA Electronic Filing

Mr. Oscar Ponce
U.S. Attorney's Office
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/s/ Anthony P. Troiani
ANTHONY P. TROIANI